NO. 83-2064

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

T.H. BELL, SECRETARY OF EDUCATION,

Petitioner,

v.

STATE OF NEW JERSEY, DEPARTMENT OF EDUCATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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Counter-Statement of Question Presented

Whether the 1978 Amendments to the Elementary and Secondary Education Act, which clarified the standards for Title I eligibility and corrected an administrative regulation which denied disadvantaged children Title I programs simply because they lived within an extremely poor school district, should be applied to the Newark Title I program where, even pursuant to the overly restrictive eligibility recalculations of the federal auditors, ten attendance areas had concentrations of poverty ranging from 33.5% to 27.9%; whether the Secretary's demand that New Jersey repay Title I moneys used to provide appropriate supplemental reading, mathematics and bilingual programs to disadvantaged children found to be in need of those specialized educational programs was reasonable when those programs were provided in attendance areas having concentrations of poverty ranging from 33.9% to 27.9% and where the Secretary's own regulation was amended in 1976 to recognize attendance areas with concentrations of poverty in excess of 30% as eligible for Title I funding and where Congress, dissatisfied with the Secretary's restrictive implementation of Title I, through the 1978 Amendments to the ESEA, recognized attendance areas with concentrations of poverty in excess of 25% as eligible for Title I funds.

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ARGUMENT:

The decision of the Third Circuit, wherein the 25% eligibility standard of the 1978 Amendments to the ESEA was used to measure the eligibility of Newark's attendance areas should be affirmed by this Court since it faithfully advances the overriding congressional objectives in enacting and continually strengthening the Title I legislation and since it represents a just and fair resolution of the dispute between the Secretary and the State of New Jersey 21

A. From the inception of the Title I program, the congressional objective has been to provide financial asistance to areas with high concentrations of poverty so that disadvantaged children will receive remedial programs designed to meet their unique educational needs; most assuredly, it has never been the intent of Congress to deprive eligible children of much needed educational programs simply because they live in school districts with extraordinarily high levels of poverty 27

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B. The Title I eligibility regulation, inflexibly enforced by the Department of Education to deny needed Title I programs to disadvantaged children living in attendance areas in Newark with concentrations of poverty ranging from 33.5% to 27.9%, is a rule out of harmony with the clearly articulated goals of the Title I program 34

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BRIEF FOR RESPONDENT

Counter-Statement of the Case

Before this Court for a second time is a supplemental program of compensatory education provided by the Newark Board of Education during the 1970-71 and 1971-72 school years. This particular program, funded by Title I of the Elementary and Secondary Education Act, endeavored to meet the unique educational needs of those disadvantaged children living in the Newark school district, a district which is recognized as one of the most impoverished in the United States. However, unlike *Bell* v. *New Jersey*, —— U.S. ——, 103 S.Ct. 2187, 2199, 76 L.Ed.2d 312, 329 (1983) which only concerned "the abstract question whether the Secretary [of Education] has the right to recover Title I funds under any circumstances. . . ." the present case provides this Court with the opportunity to review, for the first time, the Title I program as it was implemented by the City of Newark during the early years of a federal program which was aptly characterized by the Court below as "one of the most ambitious federal forays into the educational domain." *State of New Jersey, Dept. of Educ.* v. *Hufstedler*, 662 F.2d 208, 210 (3d Cir. 1981).

While federal courts have had occasion to consider the appropriateness of the educational programs provided with Title I funds or the eligibility of students to participate in those programs or whether the supplanting prohibition or the comparability requirement of Title I have been violated by local school districts, none of those issues are involved in the present case. The Secretary does not question the eligibility of the poor and disadvantaged children who participated in, and benefitted from, the Newark Title I program during the 1971-72 school year. Neither does the Secretary challenge the scope, size or quality of the supplemental reading, mathematics and bilingual educational programs provided those eligible children. Furthermore, the record contains not even a remote suggestion that the federal Title I moneys had been used to supplant, rather than supplement, the State and local educational

effort. Finally, as is readily conceded by the Secretary, Newark received its correct allocation of Title I moneys during the period covered by the audit. What is before this Court is the more difficult and narrower issue of whether Newark properly identified as "target populations" for the receipt of Title I moneys in the 1971-72 school year, attendance areas which, according to the federal auditors' conservative recalculations, had levels of poverty ranging from 33.5% to 27.9% or whether, in accordance with the Secretary's inflexible application of the targeting requirement, eligible children within those attendance areas should have been deprived of the educational benefits of Title I programs.

Commenting on the bill which was to become the Elementary and Secondary Education Act of 1965, President Johnson said: "This bill has a simple purpose: To improve the education of young Americans." S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1448. In reporting the original legislation to the House in 1965, the House Committee on Education and Labor stated:

> The purpose of this legislation is to meet a national problem. This national problem is reflected in draft rejection rates because of basic educational deficiencies. It is evidenced by the employment and manpower retraining problems aggravated by the fact that there are over 8 million adults who have completed less than 5 years of school. It is seen in the 20-percent unemployment rate of our 18-24-year-olds. It is voiced by our institutions of higher learning and our vocational and technical educators who have the task of building on elementary and secondary education foundations which are of varying quality and adequacy.

The Title I program was, therefore, intended to break the link between poverty and underachievement by distributing substantial federal aid to school districts experiencing difficulties in funding adequate educational programs due to "concentrations of low-income families." 20 U.S.C. §241a; H. Rep. No. 93-805, 93rd Cong. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4095. In its report on the 1966 Amendments to Title I, the House Committee stated:

> ". . . when 30 to 40 percent of the children in the district are from low-income families, all of the children in the district could be considered disadvantaged and the whole system could be upgraded. We emphasize that these funds are . . . to be used as supplementary upgrading funds and are not to replace State or local funds. State and local effort is to be maintained." H. Rep. No. 1814, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3846.

The Newark school district for the years 1970 through 1973, the period covered by the federal audit before this Court, could readily be characterized as the prototypic Title I district. The application for Title I funds for the 1971-72 school year, the primary focus of the audit, showed that 33.9% of the children in the Newark school district were from low-income families (J.A. 108). The narrative portion of this application clearly demonstrated that Newark was uniformly disadvantaged in other ways. Statistics showed a jobless rate in 1970 of 14%; a rate which was double that needed to qualify under the Economic Development Act. Another 35,000 Newark residents were earning $3,000 per year or less.[1] In 1971, the Model Cities pro-

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[1] An element of unfortunate constancy in this case is the level of poverty in the City of Newark. Indeed, of American cities with populations in excess of 100,000, Newark had a poverty rate in 1979 of 32.8%—the highest in the country. 1980 Census of Population and Housing, *Summary Characteristics for Governmental Units and Standard Metropolitan Statistical Areas*, Series PH C80-3.

gram in Newark was expanded to include the entire city. At the time the 1971-72 application was submitted, Newark had a black population of 54.2% with another 11% of its population of hispanic background. The City also had the highest percentage of slum housing in the nation, the highest incidence of crime per 10,000 population, the highest population density, a high rate of maternal mortality and the second highest birth rate. Of particular significance to the Title I program, and exacerbating the inherent difficulties of obtaining precise statistics for Newark's low-income population, was the fact that in 1970-71 Newark had the highest population turnover in the nation. Indeed, Model Cities data indicated that mobility rates reached as high as 80% for schools in the Title I area (J.A. 113 to J.A. 114; J.A. 69).

Presenting dramatic evidence of the strong correlation between desperate economic conditions and educational underachievement was the section of the Newark Title I application which reported the results of reading tests administered to its third and sixth grade pupils. Of 6,100 pupils tested in Grade 3, 82 out of every 100 pupils were below norm. Only two schools of the 51 elementary schools were at or above the national norm. The testing results were even more distressing for Newark's sixth grade students. In this grade approximately 5,400 pupils were tested on the Reading Comprehension section of the Metropolitan reading test. Of these, 92 out of every 100 children were below the national norms and of the 44 elementary schools tested, none had a medium at or above the norm. Reported data also showed that the majority of children in all of the project areas suffered from at least one of the following educational handicaps

1) insufficient knowlege of English

2) poor speech patterns

3) lack of ability to communicate verbally with others

4) low levels of aspiration and self esteem

5) health, home and cultural handicaps

(J.A. 110 to J.A. 113).

In 1974 the Department of Health, Education and Welfare Audit Agency (hereafter HEWAA) conducted an audit of the Newark Title I program for the period from September 1, 1970 to August 31, 1973. Of the $28,709,198 in Title I funds sub-allotted to Newark during that period, $9,899,446 was received for the 1971-1972 school year. The eligibility of the educationally disadvantaged children who participated in Title I programs during this period was not at issue nor was there any question that Newark provided supplemental programs of compensatory education of sufficient size, scope and quality to meet the unique educational needs of its children.[2] Rather, the federal auditors focused on whether Newark had properly determined its eligible attendance areas; whether it had correctly identified its "target populations." This targeting requirement is a preliminary step in the Title I process whereby target populations of children are identified; these target populations are then considered for participation in Title I

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[2] *Amicus*, Lawyers' Committee for Civil Rights under Law, concedes that the federal auditors did not question the "size, scope and quality" of the compensatory education programs provided by Newark during the audit period. *Amicus* brief at 6, n. 15. However, *Amicus* suggests for the first time before this Court that perhaps Newark's programs failed to meet those requirements. Such speculation finds absolutely no support in the record below. Indeed, quite to the contrary, the record demonstrates that at a time when school districts nationally were spending an average of $175 from Title I funds for each Title I student, the Newark program provided $300 from its Title I funds for each student participating in the federal program (J.A. 108); H. Rep. No. 93-805, 93d Cong., 2d Sess. *reprinted in* [1974] U.S. Code Cong. & Ad. News 4096. Clearly these per pupil expenditures in 1971 were more than sufficient to assure the provision of meaningful programs of compensatory education to Newark's disadvantaged children.

activities on the basis of educational deficiency and the need for special services. *ESEA Title I Program Guide #44* (March 18, 1968) (PNJa223).[3]

At the time of the Newark audit, the statutory eligibility standard simply provided that Title I funds should be used for projects designed to meet the special educational needs of educationally deprived children in "school attendance areas having high concentrations of children from low-income families," 20 U.S.C. §241e(a)(1). This eligibility standard was interpreted by Title I regulations as including attendance areas in which the estimated number or estimated percentage of children from low-income families was as large as, or larger than, the estimated average number or percentage of such children in the school district. 45 C.F.R. §116.17(d)(2) (1972) (PNJa217 to PNJa220). This regulation also specifically provided:

> In certain cases, the whole of a school district may be regarded as an area having a high concentration of such children [from low-income families] and be approved as a project area, but only if there is no wide variance in the concentrations of such children among its several attendance areas in the school district.

The regulations also defined an "attendance area" as meaning "in relation to a particular school, the geographical area in which the children who are normally served by that school reside." 45 C.F.R. §116.1(b). Thereafter, the regulations define "project area" as the "attendance area, or combination of attendance areas, having a high concentration of children from low-income families which, without regard to the location of the project itself, is designated as the area whose children are to be served by the project." 45 C.F.R. §116.1(v).

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[3] PNJa—— refers to the Appendix filed on behalf of the State of New Jersey, Department of Education, in the Court of Appeals for the Third Circuit.

The Newark Title I application for 1971-72 showed that 33.9% of the children in the Newark school district were from low-income families. Its application further showed 54 elementary schools with low-income percentages ranging from 84.7% to 10%. Following 45 C.F.R. §116.17(d), Newark designated the 42 elementary schools having low-income percentages in excess of 33.9%, the district-wide average, as eligible attendance areas for Title I programs. Newark also listed 8 high schools having low-income percentages ranging from 59% to 16.5% and 5 junior high schools with percentages from 69.5% to 41.6%. Of these, Newark designated 6 high schools and 4 junior high schools with low-income percentages in excess of 33.9% as eligible for Title I programs (PNJa366 to PNJa367).

The HEWAA auditors reviewed the methodology employed by Newark to select its attendance areas. At the outset, they found that Newark, after considering various data sources, determined to rely on Aid for Dependent Children (ADC) statistics supplied to it by the Essex County Welfare Board to calculate its attendance area eligibility.[4] However, in reviewing the statistics provided by the Welfare Board, the auditors found them to be incomplete, listing only ADC children enrolled at each public school and excluding "those children on ADC rolls attending private and special education schools [established for children with special handicaps] or who had dropped out of school" (J.A. 20). Since complete ADC statistics were not available to Newark for the 1971-72 school year, Newark was unable to determine the number of ADC children residing within the various attendance areas and eligible to attend the public schools. The gap in the ADC statistics forced Newark to use the number of ADC children *actually* attending the public school, rather than those *eligible* to attend the public schools, to calculate attendance

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[4] ADC statistics were recognized as an acceptable data source for determining the number of children from low-income families. *ESEA Title I Program Guide #44* (March 18, 1968) (PNJa223).

area eligibility. The HEWAA auditors recognized that this methodology was a "reasonable alternative" under Newark's unique circumstances although they pointed out that it would tend to underestimate the number of ADC children in each attendance area (J.A.20 to J.A.21).[5]

Analyzing Newark's application of this acceptable methodology, the HEWAA auditors concluded that Newark had correctly calculated its district-wide low-income percentage of 33.9% for the 1971-72 school year (J.A.20). However, the auditors found that in determining attendance area eligibility, Newark had erroneously compared (1) the number of ADC children residing in each attendance area and actually attending *public schools* with (2) the total

[5] Since the early years of the Title I program, sophisticated systems have been developed to more accurately capture and report statistical information on children from low-income families. An indication of the higher degree of accuracy, as well as the increasingly impoverished state of the city, is the Chapter 1 application for the Newark school district for the 1984-85 school year which shows a district-wide level of poverty of 58.63%. While the incidence of poverty in Newark may well have increased from 33.9% in 1971-72 to 58.63% in 1984-85, it may also be that the incomplete statistics available in the earlier year artificially deflated Newark's district-wide level of poverty. Also of particular interest to the present case are the current levels of poverty in the various attendance areas declared ineligible for Title I funds in 1971-72. The 1984-85 application shows the following:

School	1984-85 Low-income percentage
Madison	78.29%
Newton Street	70.56%
So. 17th Street	73.91%
Central Avenue	Closed
Burnet Street	74.62%
Waverly Avenue	Closed
Franklin	78.43%
Garfield	75.57%
Hawkins	49.46%
Clinton Jr. High	Closed
Marcus Garvey	41.65%

number of children residing within each area and attending the *public elementary schools*. The auditors found that the "results were unacceptable since there was no direct relationship between the component elements" (J.A.21). They replaced the Newark formula with one which eliminated the ADC children attending secondary schools from the comparison. By applying their revised formula, the auditors reported that the following schools were ineligible for receipt of Title I funds during the 1971-72 school year:

Low-Income Percentage

School Attendance Area	Shown by Newark on Application	As Computed by Auditors	Title I Expenditures Disallowed by Auditors
Madison	60.6%	28.8%	$ 130,750
Newton Street	54.9	31.5	69,463
So. 17th Street	53.1	33.5	104,842
Central Avenue	53.0	29.4	61,532
Burnet Street	50.6	30.2	56,007
Waverly Avenue	49.9	31.9	56,665
Franklin	46.5	32.4	115,227
Marcus Garvey	46.2	22.9	119,487
Garfield	34.7	20.6	81,976
Hawkins	34.7	30.3	102,803
Clinton Jr. High	69.5	32.1	58,214
Weequahic High	37.5	27.9	53,284
East Side High	35.0	13.0	46,380
			$1,029,630

(J.A.23, J.A. 24, J.A.25).[6] The auditors found, however, that Newark's problems in calculating the eligibility of its attendance areas "did not recur and the City's eligibility determinations for school year 1972-73 were properly

[6] The HEWAA auditors also found that $132,284 in Title I moneys had been expended during 1970-71 in Newark schools which the auditors alleged were not eligible for receipt of such funds. This disallowance is not involved in the present matter since $130,613 of the disallowance was barred by operation of the applicable statute of limitation. 20 U.S.C. §884 (1974).

made." (J.A.15). Indeed, the auditors specifically concluded that

> . . . the low-income percentages computed for school year 1972-73 were proper and were based on more precise information. The Essex County Welfare Board had furnished BOE [Newark] with a list showing the name and address of each child, age 5-17, in the ADC category. BOE [Newark] converted this data into attendance area statistics. *Thus, BOE [Newark] had available for the first time statistics indicating the total number of children from low-income families residing in the school attendance area, inclusive of drop-outs and attendees at public, non-public and special education schools.* (Emphasis added) (J.A.26).

There were, therefore, no audit exceptions for 1972-73, the final year of the Newark audit report.

By letter dated, June 20, 1975 the HEWAA report was transmitted to the New Jersey Department of Education thereby commencing an administrative process which was to continue until 1980 (J.A.9 to J.A.10). This Report was followed on June 11, 1976 by a Final Audit Determination Letter demanding that New Jersey refund $1,161,917 to the Office of Education.

In its application for review, dated October 21, 1976, the State of New Jersey advanced its substantive challenges to the Final Audit Determination. The State argued, at the outset, that the attendance areas declared ineligible by the federal auditors were, in fact, eligible for Title I assistance.[7] In support of this position, the State submitted re-

[7] Although New Jersey acknowledged before the Education Appeal Board that Newark had applied a "flawed" formula to determine the eligiblity of school attendance areas, New Jersey has consistently

(Footnote continued on following page)

calculations of Title I eligibility. These recalculations measured eligibility by comparing the total number of ADC children from each attendance area actually enrolled in public elementary and secondary schools with the total number of children from the area actually enrolled in public elementary and secondary schools. The formula employed by the State therefore responded to the auditors' criticism of the Newark methodology since the component elements were directly related. More importantly, unlike the federal recalculations, it did not remove ADC children in secondary schools from the formula; rather, it simply added all children in public secondary schools to the comparison. The State's recalculations, therefore, more accurately reflected the number of low-income children attending public schools in the various attendance areas than did

(Footnote continued from preceding page)

maintained throughout this protracted litigation that the 13 controverted attendance areas were indeed eligible to receive Title I moneys (Pet. App. 35a to 36a; 49a to 56a; PNJa55; PNJa69; PNJa74 to PNJa77). Particularly instructive in this regard is the complete excerpt from the June 21, 1979 hearing before the Education Appeal Board cited by both the Secretary (Pet. B. 11 n.5) and *Amicus* (B. 10 n.22):

> "We recognize, and these calculations are in fact an acknowledgement of the fact that there were irregularities in the original grant approval process. In fact, we have never denied that.
>
> "What the [New Jersey] recalculations represent is an attempt by the State to show *that the areas involved were in fact eligible for assistance under Title I that children who Congress meant to be served by Title I were in fact served and that the mission of the statute was in fact met* . . . (PNJa516) (emphasis added).

those of the federal auditors.[8] In the alternative, New Jersey argued that the whole of the Newark school district, which had a district-wide low-income percentage of 33.9%, qualified for designation as a Title I area under applicable regulations and in accordance with the clearly expressed intent of Congress (J.A.71 to J.A. 73).

In addition to these substantive challenges to the validity of the final audit determination, New Jersey argued that the United States Department of Education was without

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[8] Following is a comparison of the eligibility calculations performed by the federal auditors and the State of New Jersey:

1971

Low Income Percentage

	Calculation of HEWAA Auditors	Calculation of New Jersey
Madison	28.8%	39.7%
Newton Street	31.5	42.8
So. 17th Street	33.5	40.3
Central Avenue	29.5	41.4
Burnet Street	30.2	39.0
Waverly Avenue	31.9	37.2
Franklin	32.4	34.8
M. Garvey	22.9	36.1
Garfield	20.6	26.0
Hawkins	30.3	25.9

(Pet. App. 53a)

The State did not submit calculations for the secondary schools since it was the State's position that, under the applicable rules, only elementary attendance areas had to qualify as eligible attendance areas (PNJa371). Indeed, the *Guidlines: Special Programs for Educationally Deprived Children* (OE-35079) 23, specifically provided:

> In general, a secondary school whose attendance area comprises several elementary schools with high concentrations of children from low-income families should also be considered an eligible area for a project.

statutory authorization to order New Jersey to repay moneys received under Title I grants in the 1970-71 and 1971-72 school years.

The Education Appeal Board rejected both the jurisdictional and substantive arguments advanced by New Jersey and demanded that the State repay $1,031,394 to the United States Office of Education.[9] By letter dated May 7, 1980, New Jersey was advised that the Panel's Decision was the final decision of the United States Department of Education.[10]

A Petition for Review of the decision of the Secretary of Education was filed with the United States Court of Appeals for the Third Circuit pursuant to 20 U.S.C. §2851. In it, New Jersey once again advanced both its substantive and jurisdictional arguments. In an opinion issued

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[9] The members of the Education Appeal Board were clearly troubled, however, by disallowances which resulted from the high level of poverty in the Newark school district (PNJa568 to PNJa 572). Indeed, Counsel for the Office of Education responded to such concerns by noting that Congress had "corrected" this situation by permitting attendance areas with a certain low-income percentage to "automatically be considered eligible" for Title I funding (PNJa 572). However, the Education Appeal Board, in reaching its decision, observed that it was "not authorized to determine whether the regulations are consistent with the statute and the expressed legislative intent . . ." but ". . . must apply the regulations on the assumption they are valid" (Pet. App. 57a).

[10] The Secretary, by this decision issued in 1980, found 13 attendance areas in Newark ineligible to receive Title I moneys notwithstanding the federal auditors' finding that 7 of those 13 areas had levels of poverty in excess of 30% and notwithtanding the fact that Education's own regulation, in effect since 1976, recognized as automatically eligible for Title I funds, 30% areas. The Secretary, by this decision, found the 13 areas ineligible even though 10 of the 13 areas had concentrations of low-income families in excess of 25% and even though Congress, in the 1978 Amendments to the ESEA, clearly articulated its intent that these 25% areas be eligible for Title I funds.

October 13, 1981, the Third Circuit granted the Petition of Review, reversed the order of the Department of Education and remanded with instructions "to vacate the orders requiring a repayment by petitioners of previously received Title I funds." *State of New Jersey, Dept. of Educ.* v. *Hufstedler*, 662 F.2d 208, 219 (3d Cir. 1981). Since the Third Circuit concluded that the Department of Education was without authority to issue the Order before it, the substantive challenges advanced by New Jersey as to the correctness of the audit determination were not reached.

This Court granted *certiorari* and reversed, concluding that the pre-1978 version of the Elementary and Secondary Education Act contemplated that states misusing federal funds would incur a debt to the Federal Government for the amount misused. *Bell* v. *New Jersey*, —— U.S. ——, 103 S.Ct. 2187, 76 L.Ed.2d 312 (1983). The Court also found that the Secretary had followed the proper procedures in administratively determining the amount owed by the states to the Federal Government. However,

> [w]hether that determination is supported by substantial evidence and by application of the proper legal standards is a question for the courts, if the affected parties seek judicial review. Here, New Jersey and Pennsylvania sought that review, and we remand to the Court of Appeals to permit it to undertake to review the challenges raised by each State to the Secretary's determination.[11] *Bell, supra*, 103 S.Ct. at 2198, 76 L.Ed.2d at 328.

Furthermore, the Supreme Court having only decided that states can be held liable for the misuse of funds, left

[11] Upon remand, the Third Circuit designated one of its judges to hold conferences with the respective parties in order to determine whether the matters could be settled. Although the *Pennsylvania* case settled, efforts to resolve the *New Jersey* matter failed. An Order was, thereafter, issued on September 27, 1983 directing the parties in the *New Jersey* case to file supplemental briefs.

> . . . for the Court of Appeals on remand the question of whether the substantive standards of the ECIA or the 1978 amendments can apply to grants approved and paid under the pre-1978 ESEA. *Bell, supra*, 103 S.Ct. at 2192, 76 L.Ed.2d at 321.

In his concurring opinion, Justice White further noted

> . . . these cases do not involve any question as to the substantive standard by which a claim that a recipient has violated its Title I commitments is to be judged. Rather, they concern the abstract question whether the Secretary has the right to recover Title I funds under any circumstances. In my view, *there is a significant issue whether a State can be required to repay if it has committed no more than a technical violation of the agreement* or if the claim of violation rests on a new regulation or construction of the statute issued after the State entered the program and had its plan approved. (Emphasis added) *Bell, supra*, 103 S.Ct. at 2199, 76 L.Ed.2d at 329.

Although pressed by New Jersey to do so, the Third Circuit on remand did not address this "significant issue" articulated by Justice White.[12] Rather, it decided, in a

[12] The *New Jersey* case on remand was briefed and argued subsequent to the decision of the Sixth Circuit in *Com. of Ky., Dept. of Educ.* v. *Secretary of Educ.*, 717 F.2d 943 (6th Cir. 1983). Arguing in the alternative, New Jersey urged the Third Circuit to follow the Sixth Circuit decision and address the significant issue left open in *Bell*. New Jersey contended that the Newark Title I program for the 1971-72 school year was in substantial compliance with the requirements of Title I of the ESEA and any mere technical violation which may have occurred in determining attendance area eligibility did not justify the imposition of the repayment sanction against it (PNJsb27 to PNJsb35). The Third Circuit declined to decide the case on this basis. Had it done so, New

(Footnote continued on following page)

particularly restrictive fashion, the precise issue left it by this Court, *i.e.*, whether the substantive standards of the 1978 Amendment apply to the Newark Title I program. The court found initially that the eligibility standards contained in the Title I regulation, 45 C.F.R. §116.17(d) (1972), worked an "injustice . . . on areas with high concentrations of low-income families." *State of N.J., Dept. of Educ.* v. *Hufstedler*, 724 F.2d 34, 36 (3d Cir. 1983). It found that Congress had enacted, as part of the 1978 Amendments to the ESEA, a 25% eligibility standard to prevent these inequities. 20 U.S.C. 2732(a)(1). This standard permitted local educational agencies, such as Newark, to declare school attendance areas eligible for Title I funds if at least 25% of the children in those areas are from low-income families and if certain conditions are met. The court found that 25% standard was included in the 1978 Amendments "to correct regulations that frustrated the basic objectives of the Title I program." *Id.* at 36-37. Since the Secretary's application of the discredited Title I regulation to Newark continued precisely the same injustices as Congress sought to correct by enacting the 25% standard, the Third Circuit concluded that the eligibility of Newark's school attendance areas should be measured by that corrective standard.[13] The matter was

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(Footnote continued from preceding page)

Jersey would have been relieved of responsibility for repaying any federal moneys. Under the Third Circuit's more restrictive holding, New Jersey is only relieved of responsibility for repaying Title I funds expended in attendance areas with levels of poverty in excess of 25% ($781,787) and only upon a demonstration that the conditions for the application of the 25% standard have been met. New Jersey, under the Third Circuit decision, must repay to the Secretary a minimum of $249,607.

[13] The Third Circuit determined to apply the corrective 25% standard to measure the eligibility of Newark's attendance areas

(Footnote continued on following page)

remanded to the Secretary for additional proceedings wherein Newark would have the opportunity to demonstrate compliance with the conditions necessary to apply the 25% standard contained in the 1978 Amendments to the ESEA.[14]

The Third Circuit, in an Order entered on February 7, 1984, denied a Petition for Rehearing (Pet. App. 62a). On June 15, 1984, a Petition for a Writ of Certiorari was filed on behalf of the Secretary of Education which Petition was granted by this Court on October 1, 1984 (J.A.115).

Summary of Argument

The difficult and extremely narrow issue before this Court is whether Newark, during the 1971-72 school year, properly identified as "target populations" for the receipt of Title I moneys, thirteen attendance areas, ten of which, even according to the federal auditors' conservative recalculations, had levels of poverty ranging from 33.5% to 27.9%. Unlike other Title I matters which have been reviewed by federal courts, the Newark program implicated

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(Footnote continued from preceding page)

rather than address the validity *vel non* of the administrative regulation under which these attendance areas had originally been declared ineligible (PNJsb21 to PNJsb23). Had the court below not applied the 25% standard but invalidated the regulation, New Jersey would have been absolved of responsibility for the payback of any federal funds. However, under the Third Circuit's ruling, New Jersey must repay to the Secretary a minimum of all Title I moneys expended in Newark attendance areas which had a level of poverty below 25%.

[14] Following the decision of the Third Circuit, the State Department of Education and the Newark Board of Education have engaged in a joint effort to secure information and material necessary to demonstrate such compliance. The Secretary, however, has not acted to reopen the administrative proceeding before him.

neither the scope, size, or quality of the supplemental programs of reading, mathematics and bilingual education provided by Newark nor the eligibility of the disadvantaged students who participated in those programs. Indeed, the Secretary has never questioned those vital aspects of Newark's Title I program. Nor does this case involve possible violations of the supplanting prohibition nor the failure to meet the comparability requirements of Title I. Again, the Secretary has never suggested that Newark failed to comply with those fundamental Title I mandates. Further, as the Secretary himself concedes, there is no question in this case that Newark received the correct amount of Title I moneys for the audit period. Finally, as the record clearly demonstrates, the Newark targeting issue was an isolated problem existing only in the 1971-72 school year and as a direct consequence of the unavailability of complete statistics for Newark's children from low-income families. When complete statistical information was made available to it in 1972-73, Newark utilized it to correctly determine attendance area eligibility and was found to be in compliance with the targeting regulation.

Under the Title I legislation, attendance area eligibility or targeting is a preliminary step in the process whereby target populations of children are identified and thereafter considered for participation in Title I activities on the basis of educational deficiency and the need for special services. At the time of the Newark audit, Title I itself simply provided that Title I funds should be "targeted" to "school attendance areas having high concentrations of children from low-income families." 20 U.S.C. §241c(a)(1). The administrative targeting regulation, effective at the time, however, restricted eligible attendance areas to those which had a level of poverty equal to, or in excess of, the district-wide level of poverty. This restrictive targeting regulation, rigidly applied by the agency to require mathematical exactitude, leads to an anomolous situation in extremely poor districts. Children living in

attendance areas with concentrations of poverty as high as 20%, 25%, 30% or even 33.5% would be denied needed remedial programs simply because they lived in a school district with an excessively high level of poverty. Had those children lived in more affluent school districts, they would have received the educational programs essential to meet their specialized needs.

Congress, firmly committed to providing needed assistance to disadvantaged children in very poor school districts, recognized that in districts where the district-wide level of poverty is extremely high, *i.e.*, between 30% and 40%, *all* children in the district could properly be considered a "target population" for Title I services. Moreover, increasingly disgruntled with the restrictive targeting regulation, rigidly enforced by the Secretary to the disadvantage of poor children within poor districts, Congress acted to correct that deficient regulation and harsh administrative practice through the 1978 Amendments to the ESEA. As part of that enactment, Congress included a 25% eligibility standard making it absolutely clear that children living in attendance areas with levels of poverty in excess of 25% or 30% should have the opportunity to participate in Title I programs regardless of the district-wide level of poverty.

The audit of the Newark Title I program projects the exact situation which Congress acted to correct in 1978 when it adopted the 25% eligibility standard. Since the district-wide level of poverty in Newark in 1971-72 was 33.9%, the federal auditors declared 13 attendance areas which had levels of poverty below 33.9% ineligible for federal funding. Even pursuant to the federal auditors' conservative recalculations, 10 of these areas had levels of poverty ranging from 33.5% to 27.9%. Had these attendance areas been within the overwhelming majority of school districts in the United States they, and their disadvantaged children, would have been eligible for receipt of Title I services.

On remand, the Third Circuit confronted the issue left to it by this Court—whether to measure the eligibility of Newark's attendance areas by the 25% standard contained in the 1978 Amendments to the ESEA or to apply the long discredited "targeting" regulation which would render ineligible any area where the level of poverty was not precisely at 33.9%, Newark's district-wide level of poverty. In deciding this troublesome issue, the Third Circuit did what courts of equity historically do—it attempted to give full effect to the policy of the Legislature. In resolving this difficult issue, the Third Circuit did what courts traditionally do when asked to give retroactive application to a statute—it carefully weighed and balanced the relative equities on both sides of the issue.

The court, after fully reviewing the Title I legislation and its history, concluded that Congress always intended that the benefits of this important federal program would be available to disadvantaged children living in areas with high concentrations of poverty and never anticipated that poor children would be denied Title I programs simply because they lived within extremely poor school districts. Indeed, dissatisfied with the restrictive targeting requirement, inflexibility applied by the Office of Education, Congress acted affirmatively and unambiguously to correct those discordant administrative regulations and practices by enacting as part of the 1978 Amendments to the ESEA a 25% eligibility standard. The Third Circuit determined to measure the eligibility of Newark's attendance areas by this 25% standard. To do otherwise, to apply the long discredited targeting regulation, would simply continue those inequities which the 25% eligibility standard was designed to correct.

In measuring the eligibility of Newark's attendance areas by the corrective 25% standard, the Third Circuit faithfully adhered to this Court's ruling in *Bradley* v. *School Board of Richmond* since it applied the eligibility standard in effect at the time of its decision, since the intervening

statutory change concerned the precise issue pending before it on appeal, since there was no statutory direction or legislative history to indicate that the eligiblity provision could not be applied to pending audit claims and since the application of the 25% eligibility standard to the Newark program resulted in no harm to the federal government but rather served to further the clearly articulated objectives of the Title I program. The decision of the Third Circuit which advanced the fundamental purposes of the Title I legislation and which carefully weighed and balanced the equities as between the Secretary and the State of New Jersey is eminently fair and just, and, therefore, should be affirmed by this Court.

ARGUMENT

The decision of the Third Circuit, wherein the 25% eligibility standard of the 1978 Amendments to the ESEA was used to measure the eligibility of Newark's attendance areas should be affirmed by this Court since it faithfully advances the overriding congressional objectives in enacting and continually strengthening the Title I legislation and since it represents a just and fair resolution of the dispute between the Secretary and the State of New Jersey.

Upon remand from this Court, the Third Circuit was faced with the difficult choice of whether to measure the eligibility of attendance areas in Newark for Title I funds by an unduly restrictive administrative regulation in effect at the time of the Newark program in 1971 and 1972 or whether to measure eligibility by a subsequently enacted legislative standard which corrected that deficient administrative regulation.

The Secretary urged the court below to apply an administrative targeting requirement which limited eligible attendance areas to those which had a level of poverty equal

to, or in excess of, Newark's district-wide level of poverty: 33.9%. The Secretary also argued that this regulation should be applied to the Newark attendance areas with mathematical exactitude so that even an area with a 33.5% level of poverty should be declared ineligible for Title I funding. At the same time that the Secretary asked the court to apply this targeting requirement to Newark's attendance areas with rigid precision, he also opposed recalculations offered by New Jersey which would more accurately reflect the concentrations of children from low-income families in those areas. Finally, although the targeting regulation in place at the time of the Newark program permitted an entire district to be designated as an eligible Title I project area, the Secretary contended that Newark did not qualify for such designation since it had "wide variations" in the levels of poverty among its attendance areas. Accordingly, the Secretary asked the court to affirm his decision that thirteen attendance areas within the Newark school district be declared ineligible for Title I funding even though ten of those areas had levels of poverty ranging from 33.5% to 27.9%. Furthermore, the Secretary asked the Court to affirm his order that New Jersey repay $1,029,630 in Title I moneys expended in those thirteen Newark attendance areas even though those moneys were utilized by Newark to fund appropriate supplemental reading, mathematics and bilingual programs which were provided to eligible disadvantaged children in need of these specialized educational services and even though those attendance areas would have been eligible for Title I funding had they been within a more affluent school district and not within a district such as Newark which had an exceedingly high level of poverty.

The State, for its part, renewed the arguments previously made to the Third Circuit but not addressed in *State of New Jersey Dept. of Educ.* v. *Hufstedler*, 662 F.2d 208 (3d Cir. 1981) (PNJsb35). At the outset, New Jersey contended that its recalculations of Title I eligibility should be accepted by the court since they represented more

accurate approximations of the concentrations of poverty within Newark's attendance areas including as they did children from low-income families actually enrolled in public secondary schools as well as those children actually enrolled in public elementary schools. The State pointed out that this factor was particularly important for the 1971-72 school year since Newark did not have available complete statistical information for children from low-income families who were not actually attending the public schools but who were enrolled in private and parochial schools, in special schools or who had simply dropped out of the educational system. Since this gap in statistical information artificially compressed the levels of poverty throughout Newark's attendance areas, the further exclusion of ADC children attending the public secondary schools from the Title I calculations only served to further exacerbate the underreporting problem. New Jersey also argued that, even assuming the propriety of the federal auditors' conservative recalculations, the entire Newark school district was eligible for designation as a Title I project area under the 1972 targeting regulation since its district-wide level of poverty was 33.9%. In support of this argument, New Jersey pointed to the legislative history of Title I which confirmed that when 30 to 40% of the children in a school district are from low-income families "all of the children in the district could be considered disadvantaged and the whole system could be upgraded." H.R. Rep. No. 1814, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3846. The argument for district-wide designation in Newark was particularly compelling since during the period of the audit Newark's mobility rate was the highest in the nation, reaching as high as 80% for schools in the Title I area. Given Newark's extraordinarily high mobility rate, which translated into significantly shifting low-income populations among its attendance areas, New Jersey urged that district-wide designation of Newark as a Title I project area was appropriate under the targeting regulations in

effect in 1971 and 1972. An 80% mobility rate within the Newark district dramatically illustrates not only the inherent difficulty of amassing the precise, detailed statistical information required by the Secretary, but the fallacy of rigid adherence to attendance areas for determination of Title I eligibility for an impoverished district. Obviously, given that mobility rate, an attendance area's eligibility under the Secretary's rigid formula may (and probably will) shift during the entitlement period. In such circumstances, only a district-wide determination of eligibility can achieve the Congressional purpose in enacting Title I.

On remand, the State supplemented these arguments by urging the Third Circuit to affirmatively decide the issue left to it by this Court, *i.e.*, whether the substantive provisions of the 1978 Amendments to the ESEA should be applied to grants approved and paid under the pre-1978 ESEA. New Jersey submitted that the eligiblity provision contained in the 1978 Amendments to the ESEA, whereby attendance areas with levels of poverty in excess of 25% could receive Title I funds irrespective of the district-wide incidence of poverty, should be applied to measure the eligibilty of Newark's attendance areas. The State argued that the application of this statutory eligibility standard would be entirely appropriate since it corrected a seriously deficient administrative regulation which deprived educationally disadvantaged children living in areas with high concentrations of poverty of necessary compensatory educational programs, simply because they lived within school districts with extremely high levels of poverty.

The State argued in the alternative, on remand, that the sanction of repayment should not be imposed against New Jersey since the Newark Title I program provided appropriate supplemental programs of compensatory education to eligible disadvantaged children living in areas of high concentrations of poverty and was therefore, in substantial compliance with all requirements of Title I. In making

this argument, New Jersey urged the Third Circuit to follow the decision of the Sixth Circuit in *Com. of Ky., Dept. of Educ.* v. *Secretary of Educ.*, 717 F.2d 943 (6th Cir. 1983).

In considering whether to measure the eligibility of the Newark attendance areas by the corrective 25% eligibility standard or by the earlier more restrictive targeting regulation, the Third Circuit sought to do what courts of equity historically do, "give effect to the policy of the Legislature." *Mitchell* v. *DeMario Jewelry*, 361 U.S. 288, 292 (1960). Indeed, the polestar of the decision below is the legislative objective in establishing and strengthening the Title I program. In determining whether to apply the 25% eligibility standard or affirm the Secretary's inflexible application of his regulations, the Third Circuit declined to simply "rubber stamp" that administrative decision but rather carefully scrutinized it to determine whether it frustrated the congressional policy underlying the Title I program. *See Bureau of Alcohol, Tobacco & Firearms* v. *FLRA*, —— U.S. ——, 104 S. Ct. ——, 78 L. Ed. 2d 195 (1983). Finally, in deciding whether to apply the intervening statutory amendment to the Newark Title I program, the Third Circuit did what courts traditionally do when considering the retroactive application of a statute—it carefully balanced the interests on both sides of the issue. *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203. *See* Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692 (1960).

The Third Circuit, after carefully reviewing the legislative history of Title I and studying the relative equities as between the parties, refused to apply the long overruled targeting regulation finding that to do so would clearly offend the overriding objectives of the Title I legislation by denying the benefits of this important educational program to disadvantaged children simply because they lived within a school district of extreme poverty. Rather than apply the inflexible targeting requirement and

continue its inequitable consequences, the court below applied the 25% statutory eligiblity standard which corrected that discordant agency regulation and practice.

In determining to apply the 1978 eligibility standard, the Third Circuit scrupulously balanced the interests of the Secretary and the State of New Jersey. By choosing the 25% eligibility standard, the court applied the specific statutory provision which corrected the deficient administrative practice before it on appeal. In applying this statutory standard, the court held New Jersey responsible for the return to the Secretary of $247,845, the Title I moneys expended in attendance areas with levels of poverty below 25%. Had the Third Circuit simply invalidated the targeting regulations or, following the decision of the Sixth Circuit in the *Kentucky* case, found Newark in substantial compliance with the targeting regulations, Newark would have been completely absolved of responsibility for the full amount of the audit exception.

The decision of the Third Circuit which advanced the fundamental purposes of the Title I legislation and which carefully balanced the interests of the parties before it, is, therefore, eminently fair and should be affirmed by this Court. Indeed, the equitable result reached by the court below is in stark contrast to the inflexible and harsh position espoused by the Secretary who has adamantly refused to apply the targeting regulations in a manner tailored to address the unique problems faced by Newark, a large urban school district with an extremely high level of poverty and an even higher mobility rate among its various attendance areas. Indeed, unlike his decision in the *Kentucky* case where the Secretary, although finding a violation of the supplanting prohibition, waived 52% of the audit exception "for good cause shown," the Secretary in the present case has refused to waive any portion of the Newark disallowance even in the face of the unmistakable Congressional pronouncement that it never intended that attendance areas with levels of poverty in excess of 30%, and later 25%, should be denied Title I funding.

A. From the inception of the Title I program, the congressional objective has been to provide financial assistance to areas with high concentrations of poverty so that disadvantaged children will receive remedial programs designed to meet their unique educational needs; most assuredly, it has never been the intent of Congress to deprive eligible children of much needed educational programs simply because they live in school districts with extraordinarily high levels of poverty.

This case turns on the substantive provisions of the Elementary and Secondary Education Act which govern the eligibility of school attendance areas to receive Title I moneys. The provision of the ESEA in effect at the time in the Newark application was approved and the Title I moneys expended during the 1971-72 school year, 20 U.S.C. §241e(a)(1), simply provided:

> . . . payments under this subchapter will be used for programs and projects . . . (A) which are designed to meet the special educational needs of educationally deprived children *in school attendance areas having high concentrations of children from low-income families* . . . (Emphasis added).

The legislative intent in establishing this broad eligibility standard can only be ascertained by a careful review of the rich history of the Title I program which sought to sever the link between poverty and educational failure.

From the earliest days of Title I, Congress recognized that extremely poor school districts have unique problems and that the Title I program would have to be tailored to address those problems. A 1965 Senate Committee Report stated:

> It is the intention of the proposed legislation not to prescribe the specific type of programs or projects that will be required in school districts. Rather such matters are left to the discretion and judgment of the local public educational agencies. . . .

> What may be an acceptable and effective program in a school district serving a rural area may be entirely inappropriate for a school district serving an urban area, and vice versa. *There may be circumstances where a school system is basically a low-income area and the best approach in meeting the needs of educationally deprived children would be to upgrade the regular program.* On the other hand, in many areas the needs of educationally deprived children will not be satisfied by such an approach. S. Rep. No. 146, 89th Cong., 1st Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 1454 (emphasis added).

This Congressional concern with the particular needs of school districts with high levels of poverty was reaffirmed following the first year's experience under Title I. In its report on the first amendments to Title I, the House Labor and Education Committee stressed that administrative flexibility was to be the rule:

> We specifically pointed out that there may be circumstances where a whole school system is basically a low-income area and in which the best approach might be to upgrade the whole school system . . . *It is the feeling of the Committee that when 30 or 40 percent of the children in the district are from low-income families, all of the children in the district could be considered disadvantaged and the whole school system could be upgraded.* H.R. Rep. No. 1814, 89th Cong., 2d Sess., *reprinted in* [1966] U.S. Code Cong. & Ad. News 3846 (emphasis added).

The original intent of the Title I legislation was again reaffirmed in the House Committee Report on the 1974 Amendments to the ESEA wherein it was emphasized:

> As originally conceived and as extended, Title I authority is basically centered in the local educational agency (the school district). The special needs of the educationally disadvantaged child and programs to meet those needs must be locally devised. This is consistent with the Congress' historical concern that local communities should, not in conflict with constitutional and legal precriptions, formulate educational policy. . . . *This is not consistent with strict Federal administration regulations which so narrowly define "target school" that a school in one local educational agency with 10% of its enrollment of "educationally deprived" is an eligible "target school," whereas a school in another local educational agency with 30% or more is not eligible as a target school.* While it is clearly the expressed objective to serve children in schools with high concentrations, *it was never intended by the Act to render any school with a 30% concentration ineligible.* H.R. Rep. No. 93-805, 93d Cong.. 2d Sess., *reprinted in* [1974] U.S. Code Cong. & Ad. News 4108 (Emphasis added)

Congress utilized the 1978 Amendments to the ESEA to fine-tune the components of the Title I program and to clarify those ambiguities and uncertainties which were thwarting the realization of its essential objectives. H.R. Rep. No. 1137, 95th Cong., 2d Sess., 1, 22 *reprinted in* [1978] U.S. Code Cong. & Ad. News, 4971, 4992. The extensive hearings conducted by the Subcommittee on Elementary, Secondary and Vocational Education prior to the enactment of the 1978 Amendments are particularly illuminating with regard to the eligibility issue before this Court. During the hearings, the House Subcommittee heard many complaints which centered upon the inequity of the Title I requirements which resulted in schools in needy urban areas being regarded as ineligible. *Elementary and Secondary Education; Hearings on H.R. 15 Before the Subcomm. on Elementary, Secondary, and Vocational Education of the House Comm. on Education and Labor, Part*

18: *Administration of Title I of ESEA at 102; Part 21*: *The Administration's Proposal for Elementary and Secondary Education* at 635, 95th Con., 1st Sess. (1977). This anomaly in the Title I system resulted, in major part, from "federal regulations which compel the exclusion of large numbers of disadvantaged children as well as large numbers of schools with high concentrations of disadvantaged children." *Education Amendments of 1977: Hearings on S.1753 Before the Subcomm. on Education, Arts and the Humanities of the Senate Comm. on Human Resource, Part 1,* 95th Cong. 1st Sess. 92 (1978). The dilemma created by the federal regulations was aptly summarized by a witness before the Senate Subcommittee:

> Essentially a poor child in a relatively affluent district has a better chance of being in a target school and of getting services under Title I than does a similar child in a district with a high percentage of disadvantaged students. *Id.* at 93. *See also Part 12: National Organizations,* at 528-529.[15]

Distress over the inequitable situation where poor children attending schools in primarily decaying urban centers

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[15] This dissatisfaction with the federal administration of the Title I eligiblity standards was echoed by Mrs. Ruth Mancuso, testifying on behalf on the National Association of State Boards of Education:

> We have surveyed several states on a pilot basis and use Maryland as an example since information is fairly easy to obtain with its relatively few county districts (Exhibit C).
>
> In Baltimore City any school which has less than 30.3% Title I children was not eligible to receive Title I funds. This minimum is higher than the maximum incidence in schools receiving Title I funds in 11 other counties. This means there are schools in relatively affluent counties receiving Title I assistance with no more than 5% Title I children while schools in Baltimore City with 25-30% Title I children are excluded from the program. *Id.* at 392.

and isolated rural areas were denied the educational benefits of Title I programs was reflected in the House Report:

> . . . current OE regulations [45 C.F.R. §116a-20 (b)(2)] provide that any school attendance area with 30 percent or more children from low-income families (based on eligibilty for free lunch) may be designated a target area. . . . *The Committee bill reduces this minimum to 20 percent out of a concern that inflexible targeting requirement could force some school districts with very high incidences of poverty to declare schools with 20 percent low-income enrollment ineligible, while schools with only 10 percent low-income enrollment or less might be eligible in wealthier neighboring districts.* H.R. Rep. No. 1137, 95th Cong., 2d Sess. 22, *reprinted in* [1978] U.S. Code Cong. & Ad. News 4992.[16]

The 25% eligibility standard was, therefore, enacted by Congress as part of the 1978 Amendments to the ESEA to correct the serious inequities in the administration of the Title I program. 20 U.S.C. §2732(a)(1). This provision permitted a local school district to designate any attendance area with a 25% incidence of poverty as eligible for Title I funding so long as certain conditions are met.

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[16] See the Joint Explanatory Statement of the Committee of Conference indicating that by Senate amendment, the minimum percentage was raised to 25%; it is that minimum which was enacted as part of the 1978 Amendments to the ESEA. H.R. Conf. Rep. No. 1753, 95th Cong., 2d Sess. 255, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5158. The regulation referred to in the text was that in place as of 1976 under which seven of the Newark attendance areas involved here would have concededly been eligible. Yet, the Secretary, in his audit determination, steadfastly refused to give Newark the benefit of even this overly restrictive regulation. Contrast this action with the Secretary's decision in the *Kentucky* case, also before this Court, where he at least forgave over half the audit indebtedness based on the equities presented. *Com. of Ky., Dept. of Educ. supra,* 717 F.2d at 944.

Under this provision, 25% attendance areas could be appropriate targets for Title I moneys regardless of the district-wide level of poverty.

In 1981, Congress acted again to simplify the program whereby federal financial assistance is provided for the education of disadvantaged children. As part of the Omnibus Budget Reconciliation Act of 1981 (P.L. 97-35), it adopted the Education Consolidation and Improvement Act (ECIA) in an attempt to provide federal assistance "in a manner which will eliminate burdensome, unnecessary Federal supervision, direction and control." 20 U.S.C. §3801. Congress also found that federal assistance to meet the educational needs of children from low-income families would be more effective:

> . . . if educational officials, principals, teachers, and supporting personnel are freed from overly prescriptive regulations and administrative burdens which are not necessary for fiscal accountability and make no contribution to the instructional program. *Id.*

Chapter 1, which replaced Title I, further liberalized the provisions governing the eligibility of attendance areas. It provided that Chapter 1 programs and projects could be:

> (1) (A) . . . conducted in attendance areas having the highest concentrations of low-income children,
>
> (B) . . . located in all attendance areas of an agency which has a uniformly high concentration of such children; or
>
> (C) . . . designed to utilize part of the available funds for services which promise to provide significant help for all such children served by such agency. 20 U.S.C. §3805(b).

Although it was the objective of the ECIA to grant greater flexibility to local school districts and to minimize restrictive administration regulations and practices, technical imprecision in the language of the Act created uncertainties as to whether certain options, available under Title I, continued under Chapter 1. To "dispel ambiguities, to eliminate unintended results and correct drafting errors" which arose because of the manner in which the ECIA was enacted [as part of the Omnibus Budget Reconciliation Act of 1981], the 1983 Amendments to the ECIA were adopted. H.R. Rep. No. 98-51, 98th Cong., 1st Sess. *reprinted in* [1983] U.S. Code Cong. & Ad. News 2188. These amendments dispelled any doubt that the option of designating 25% attendance areas available under Title I continued under Chapter 1. Recognizing that the 25% option " has been particularly useful for the poorest school districts," the Amendments specifically permit school districts to designate as eligible for Chapter 1 funds any school attendance area in which at least 25% of the children are from low-income families. *Id.* at 2189, 2191. 20 U.S.C. §3805(d)(1).

From the legislative history of Title I, now Chapter 1, it is abundantly clear that Congress always intended that the benefits of this important federal program would be available to disadvantaged children living in areas of high concentrations of poverty. Congress never anticipated that poor children would be denied these remedial programs simply because they live in school districts of extreme poverty. Indeed, when the Office of Education developed restrictive eligibility regulations which were inflexibly applied to preclude the flow of Title I benefits to disadvantaged children, Congress acted affirmatively and unambiguously to correct those rigid administrative practices which did not further, but rather frustrated, the important objectives of the Title I program.

B. The Title I eligibility regulations, inflexibly enforced by the Department of Education to deny needed Title I programs to disadvantaged children living in attendance areas in Newark with concentrations of poverty ranging from 33.5% to 27.9%, is a rule out of harmony with the clearly articulated goals of the Title I program.

The administrative regulations which implemented the statutory standard for Title I eligibility in 1972 defined eligible attendance areas as those in which the estimated number or percentage of children from low-income families *is as large as, or greater than,* the estimated average number or percentage of such children in the school district as a whole. The Office of Education, and its successor, the Department of Education, rigidly interpreted these regulations as requiring mathematical exactitude. Further, the 1972 regulations did not contain a provision which rendered attendance areas with a certain level of poverty, *i.e.* 30%, automatically eligible for Title I assistance. This 30% provisions was not added until 1976. 45 C.F.R. §116a 20(b)(2). The 1972 regulations, however, did permit entire school districts to be designated eligible for Title I funding but only if there was no wide variance in the number or percentage of children from low-income families within the district. The Department's unyielding application of the "no wide variance" rule excluded from district-wide eligibility large urban school districts with extremely high levels of poverty since the incidence of poverty within these districts were not uniformly distributed throughout each and every geographic area. The failure to include in the Title I regulations an absolute poverty level at which attendance areas could qualify for Title I funding, together with the agency's inflexible application of its "no wide variance" rule, worked a hardship on high poverty school districts and, more importantly, upon their disadvantaged children. By virtue of the harsh application of this targeting requirement, a child in need of specialized educational services living in

a Newark attendance area with a level of poverty at 33.5% would be denied those educational services while a similar youngster within a more affluent district would receive them.

It is clear from a review of the Title I legislation and its history that these targeting regulations which produced such an anomaly are not only unsound as a matter of policy but are of dubious legal validity. It is well-established that in order for a regulation to be regarded as sound, it must be consistent with the statue under which it is promulgated. *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977). The power of an administrative officer or agency "to administer a federal statute and to prescribe rules to that end is . . . [only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute." *Manhattan General Equip. Co.* v. *Comm'r*, 297 U.S. 129, 134 (1936). The Judiciary is the final authority on issues of statutory construction and must reject administrative regulations which are contrary to clear legislative intent. *Chevron U.S.A.* v. *Natural Res. Def. Council*, 467 U.S. ——, 104 S.Ct. ——, 81 L.Ed.2d 694, 703, n. 9 (1984). A regulation which fails to carry out the legislative intent, but rather operates "to create a rule out of harmony with the statute, is a mere nullity." *Manhattan General Equip. Co., supra* at 134; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 213-14 (1976); *Dixon* v. *United States*, 381 U.S. 68 (1965). A regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's origin and purpose. *U.S.* v. *Vogel Fertilizer Co.*, 455 U.S. 16 (1982).

Although the courts recognize that a presumption of validity attaches to administrative regulations, that presumption only exists so long as the regulations are shown to be consistent with the statute they implement. *United States* v. *Larionoff, supra.* The degree of respect to be accorded to an agency's interpretation of a statute will vary depending upon such factors as the interpretation's

inherent reasonableness, its basis in the statutory text and legislative history, subsequent congressional action and whether it is based upon experience or expertise peculiarly within the agency's ken. *SEC* v. *Chenery Corp., supra,* 332 U.S. at 215; *Skidmore* v. *Swift & Co.,* 323 U.S. 134, 140 (1944); *Office of Consumer's Counsel* v. *Fed. Energy Reg.,* 655 F.2d 1132, 1141 (D.C. Cir. 1980). Another relevant consideration is the degree of scrutiny Congress has devoted to the regulation during subsequent re-enactments of the statute. *Nat'l Muffler Dlrs. Ass'n.* v. *U.S.,* 440 U.S. 472 (1975).

Of primary importance in analyzing the validity of 45 C.F.R. §116.17(d) (1972) is the intent of Congress in enacting Title I and the legislative history of this major federal program. The statutory eligibility standard for receipt of Title I moneys was simply that ". . . payments . . . will be used for programs and projects . . . designed to meet the special educational needs of educationally deprived children in school attendance areas having high concentrations of children from low-income families. . . ." Furthermore, legislative history reveals that one of the essential purposes of Title I was "directing substantial amounts of federal aid to districts experiencing difficulties in funding adequate educational programs due to concentrations of low-income families." H.R. Rep. No. 95-1137, 95th Cong., 2d Sess. 5 (May 11, 1978). Congress clearly did not intend to deprive funding to an area with such remarkably high incidences of poverty as Newark.

Quite to the contrary, as fully discussed *ante* at 27-33, Title I is replete with positive evidence of Congress' steadfast concern with the unique problems of extremely poor school districts and its commitment that eligible children within those districts not be denied necessary programs. The history of this program further demonstrates close scrutiny by Congress over the Department of Education to prevent harsh and inflexible agency practices which

might frustrate rather than further the basic objectives of Title I. Indeed when Congress has discerned any discordant practices, it has acted firmly and unambiguously to correct unduly restrictive agency action.

The designation of an entire district as a Title I project area is an early example of this interplay between the Congress and the then Office of Education. At the time of the original enactment of Title I, and when considering the 1966 Amendments to that federal program, it was recognized that there were circumstances where an entire school system would be an appropriate target for Title I services. Indeed, it was the position of the House Labor and Education Committee that "when *30 or 40 percent* of the children in the district are from low-income families, all the children in the district could be considered disadvantaged and the whole system could be upgraded." H.R. Rep. No. 1814, 89th Cong., 2d Sess., *reprinted in* [1965] U.S. Code Cong. & Ad. News 3846 (Emphasis added). Apparently to effectuate that Congressional policy, a provision was incorporated in the targeting regulations which permitted district-wide Title I designations. However, that rule failed abysmally to carry out the Congressional intent since it only permitted district-wide designations if there was "no wide variance" in the concentrations of poor children throughout the district. By adopting and stringently enforcing the "no wide variance" rule, the Office of Education effectively precluded districts such as Newark from achieving district-wide Title I designations as was clearly intended by Congress.

Indeed, as demonstrated by the Newark situation, it is wholly unrealistic to expect that poor families in large urban cities will be evenly distributed throughout every geographic area of those cities. During the committee hearings on the 1978 Amendments to the ESEA, there was testimony that large school districts could not qualify as a single attendance area under the "no wide variance" rule. *Elementary and Secondary Education; Hearings of*

H.R. 15 Before the Subcomm. on Elementary Secondary and Vocational Education of the House Comm. on Education and Labor, Part 16: Services and Student Development, 95th Cong., 1st Sess., 584-585 (1977). This testimony was consistent with the National Institute of Education study which found that without exception, the only districts which qualified under the "no wide variance" rule were small districts with enrollments under 5,000. *Id.* In sharp contrast, the student population in Newark during the 1971-72 school year was 82,894.

An even more striking example of Congressional concern with poor school districts and the children living within their boundaries can be found in the House Committee Report on the 1974 Amendments to the ESEA. The Committee members were particularly critical of

> *"... strict Federal administration regulations which so narrowly define 'target school' that a school in one educational agency with 10% of its enrollment of educationally deprived is an eligible 'target school,' whereas a school in another local educational agency with 30% or more is not eligible as a target school.* While it is clearly the expressed objective to serve children in schools with high concentrations, *it was never intended by the Act to render any school with a 30% concentration ineligible."* H.R. Rep. No. 93-805, 93d Cong., 2d Sess., *reprinted in* [1974] U.S. Cong. Code & Ad. News 4108 (Emphasis added).

Ironically, at the time of this clear articulation of Congressional intent not to render any school with a 30% concentration of children from low-income families ineligible for Title I services, the HEWAA auditors were doing precisely that in Newark.

In an apparent response to this pointed criticism of its inflexible administrative practices, the Office of Education did modify its targeting regulation in 1976 to permit 30%

attendance areas to receive Title I funds irrespective of the district-wide level of poverty. 45 C.F.R. §116a20(b)(2), 41 F.R. 42914 (September 28, 1976). However, Secretary Hufstedler, in her 1980 decision in the present matter, eschewed application of her regulation and found seven attendance areas, which according to the conservative recalculations of the federal auditors, had concentrations of poverty in excess of 30%, to be ineligible for receipt of Title I moneys. The federal moneys expended in these 30% areas totaled $563,221. Therefore, had the Secretary applied the Title I 30% rule to the Newark audit, the Newark disallowance of $1,029,630 would have been reduced to $468,083.

Finally, as has already been fully discussed *ante* at 29-32, Congress, still dissatisfied with agency practices which "forced school districts with very high incidences of poverty to declare school districts with 20% low-income enrollment ineligible, while schools with only 10 per cent low-income enrollment or less might be eligible in wealthier neighboring districts," incorporated as part of the 1978 Amendment to the ESEA a 25% eligibility standard. H.R. Rep. No. 1137, 95th Cong., 2d Sess. 22, *reprinted in* [1978] U.S. Code Cong. & Ad. News 4992. Under this provision, attendance areas with concentrations of poverty in excess of 25% cannot be rendered ineligible simply because they are situated in an extremely poor school district such as Newark which had a district-wide level of poverty of 33.9%. More to the point, disadvantaged children would no longer be made to pay the educational price for living in a poor rather than a more affluent school district. To eliminate any uncertainty that the 25% eligiblity standard was continued in Chapter 1 of the ECIA, which replaced Title I of the ESEA, the 25% option was specifically included by the 1983 Amendments to the ECIA. In the House Report on these amendments, the members cogentiy observed that the 25% option "has been particularly useful for the poorest school districts."

H.R. Rep. No. 98-51, 98th Cong., 1st Sess., *reprinted in* [1983] U.S. Code Cong. & Ad. News 2189.

There can be no doubt from this legislative history that the unambiguous objective of the Title I program was to provide disadvantaged children living in areas with high concentrations of poverty with specialized educational programs designed to meet their unique educational needs. It was never intended under the Title I program that disadvantaged children would be deprived of these valuable educational programs simply because their attendance areas were within extremely poor school districts. The restrictive Title I regulations, which rendered Newark attendance areas with levels of poverty ranging from 33.5% to 27.9% ineligible for Title I funds simply because the level of poverty in those areas did not exceed the district-wide level of 33.9%, is clearly out of harmony with the objectives of the Title I program. More importantly, those restrictive regulations, inflexibility administered by the Department of Education to deny needy children in poor districts Title I programs, were specifically rejected by Congress when it enacted the 25% eligibility requirement as part of the 1978 Amendments to the ESEA.[17] This

[17] The Secretary appears to concede that Congress did reject the policy underlying the "earlier" targeting regulations which required attendance areas to be at, or in excess of, the district-wide levels of poverty to qualify for Title I funds and which provided no relief for extremely poor school districts. However, the Secretary goes on to argue that since, at the time of the 1978 Amendments, the Title I regulations contained a 30% eligibility standard, the Congressional action in adopting a 25% standard "represented a fine tuning of the statute" from experience gained under the later regulation (Pet. Reply M. 3, n. 4). This contention is rather disingenuous since it ignores the fact that the Title I regulation at issue before this Court is not the "later" regulation with a 30% standard but the "earlier" targeting regulations which had no such standard. It is precisely this earlier, rigid, inflexible "targeting" regulation, rejected by the Congress in its establishment of a 25% standard, which the Secretary harshly applied to render attendance areas in Newark ineligible for Title I programs even though they had levels of poverty ranging from 33.5% to 27.9%.

discredited regulation should not have been used to measure the eligiblity of the Newark attendance areas since the regulations subverted the goals of that important educational program.

C. The Third Circuit correctly measured the eligibility of Newark's attendance areas by the 25% eligibilty standard enacted as part of the 1978 Amendments to the ESEA and not by the Title I regulation which, contrary to the objectives of the Title I program, ignored the unique probems of extremely poor school districts.

It is a basic tenet of American jurisprudence that a court is to apply the law in effect at the time of the decision unless manifest injustice would result from doing so or there is statutory direction or legislative history to the contrary. *Bradley* v. *School Board of the City of Richmond,* 416 U.S. 696, 711 (1974). Although *Bradley* provides the clearest statement of this rule, it has its origin in *United States* v. *Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), which succinctly explains:

> It is in the general true that the province of an appellate court is only to inquire whether a judgment when rendered was erroneous or not. But if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional . . . I know of no court which can contest its obligation. It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside.

Schooner Peggy, supra, 1 *Cranch* at 110 (footnote omitted).

Courts have routinely adhered to the principle articulated in *Schooner Peggy,* applying the law as they have found it at the time of decision even though the law may have changed by virtue of constitutional amendment, *United States* v. *Chambers,* 291 U.S. 217 (1934) (Twenty-first Amendment passed, prosecution dismissed); intervening statute, *Ziffrin, Inc.* v. *United States,* 318 U.S. 73 (1943) (Principle applied to intervening change in *state* law), *Carpenter* v. *Wabash Ry. Co.,* 309 U.S. 23 (1940) (Principle applied to intervening change in *federal* law) or jurisdictional decision, *Vandenbark* v. *Owens-Illinois Glass Co.,* 311 U.S. 538 (1941); *Hamling* v. *United States,* 418 U.S. 87 (1974) reh. den. 419 U.S. 885 (1974).

This principle has been applied to give retroactive application to both procedural and substantive changes in the law. Illustrative of the latter, is the decision of the Court in *Carpenter* v. *Wabash Ry. Co., supra,* where a plaintiff had moved to disolve an equity receivership of a railroad because of, *inter alia,* an alleged error in the appointed master's ruling that his personal injury judgment was an unsecured claim against the railroad. While a petition for a writ of *certiorari* was pending, Congress passed an amendment to the bankruptcy act wherein pending equity receiverships were to recognize claims based on personal injury judgments as preferred and were to pay such claims out of the railroad's assets as operating expenses. The Court, relying on its decision in *Schooner Peggy,* applied the law at the time of decision. In *Thompson* v. *Sawyer,* 678 F.2d 257 (D.C. Cir. 1982), female bindery workers at the Government Printing Office brought a sex discrimination suit. Relief was sought under the Equal Pay Act of 1963, an amendment to the Fair Labor Standards Act, 29 U.S.C. §206(d) (1976), and under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-2 (1976). While

the matter was pending in the district court, the definition of employer under the Fair Labor Standards Act was amended to include public employers. Citing the *Bradley* analysis, the Court of Appeals for the District of Columbia Circuit upheld the district court's decision that the defendants were retroactively liable for damages under the Fair Labor Standards Act amendments of 1974. *Id.* at 279-281.

The decision in *Schooner Peggy* did not make clear, however, whether a change in the law while a case was pending was to be given effect only where the law, by its own terms, was to apply to pending cases, as was true in *Schooner Peggy,* or whether the change in the law must be given effect unless it was clear from the law that it was not to apply in pending cases. This question was answered definitively in *Thorpe* v. *Housing Authority of Durham,* 393 U.S. 268 (1969) where the Court broadly interpreted the *Schooner Peggy* decision to apply in all situations where there is a change in the law and not just when the law by its own terms demands application in a pending case. *Thorpe, supra,* 373 U.S. at 282. The Court further stated that the presumption is to apply a change in the law in a pending case unless there is a clear indication that it was not meant to apply to pending cases. *Ibid.*

The rule originating in *Schooner Peggy,* reaching its full development in *Thorpe,* has had its most modern expression in *Bradley* which establishes a presumption in favor of the retroactive application of new statutes to judgments pending on review but a presumption which may be displaced either by a fair indication that the statute, properly construed, has only prospective effect or by resulting injustice from a retroactive application. *Bradley* v. *School Board, supra,* 416 U.S. at 716-17.

A review of the 1978 Amendments to the ESEA, including the corrective eligibility standard here under con-

sideration, discloses no positive statutory direction against their retroactive application.[18] Indeed, in his concurring opinion in *Bell* v. *New Jersey, supra,* 103 S.Ct. at 2199, Justice White specifically found:

> Here, nothing in the 1978 amendments or the legisaltive history suggests that the amendments were not intended to be applied retroactively, and their application . . . would not result in manifest injustice.

The legislative history of the Amendments, however, does contain positive evidence that their purpose was to refocus the Title I program so that it would achieve its basic objective of providing educational programs to meet the special needs of children from low-income families living within the areas of high concentrations of poverty. Indeed, as fully developed *ante* at 29-32, the legislative history surrounding the enactment of the corrective 25% eligibility standard, the specific provision of the 1978 Amendments before this Court, clearly supports its use to measure the eligibility of the Newark attendance areas for receipt of Title I moneys. The enactment of this eligi-

[18] The Secretary's reliance upon 20 U.S.C. §2702 to show the contrary is clearly misplaced. This provision merely "extends the period during which payments may be made under this title to September 30, 1983" H.R. Rep. 95-1137, 95th Cong., 2d Sess, *reprinted in* [1978] U.S. Code Cong. & Ad. News 5122. It provides no indication as to whether the substantive provisions of the Amendments, including the corrective eligiblity provision, should be applied to pre-existing grants. Nor does the Secretary find support for his position in the "holding" of the Comptroller General that "changes in appropriations or authorization statutes must be applied prospectively only" (Pet. B. at 26). Again, the Secretary fails to address the issue of whether the substantive provisions of the 1978 Amendments should be applied retroactively as contrasted with those provisions which "authorize" the Secretary to continue to make payments under the sub-chapter or which specifically appropriate public moneys for a particular program.

bility standard reformed administration of the Title I program so that the children it was meant to serve—educationally deprived children living in areas with high concentrations of poverty, would not be denied the benefits of much needed educational programs. Not to do so would be to judge the eligibility of these attendance areas by a regulation which, following the Newark audit, was modified by the agency itself and which, most significantly, was specifically overruled by the 25% eligibility standard of 1978 Amendments.

The application of the 25% standard[19] to the Newark Title I program is particularly appropriate under the *Bradley* rationale. As in *Bradley,* the statutory change concerns the precise issue *i.e.* the eligibility of school attendance areas for Title I funding, which is pending on appeal. Of course, *Bradley* is not to be narrowly construed as only permitting consideration of an intervening statute when issues affected by that statute are already on appeal. *Litton Systems, Inc.* v. *American Telepone & Telegraph Co.,* No. 83-7744 (2d Cir. Oct. 16, 1984). However, when such situation exists, as it does presently, the argu-

[19] The deletion from the legislative proposal in conference of a provision which would have required, *inter alia,* the application of the 25% standard to any pending audits of pre-1978 expenditures is offered by the Secretary as evidence of Congress' belief that the pre-1978 administrative practices were fair (Pet. B at 23, n.12). Nothing could be wider of the mark. The House Amendment, H.R. 11, sought major revisions in the audit determination procedures in GEPA with the application of the 25% eligibility standard simply one element in that overall revision. In reviewing the House Amendment, the Senate recognized that "State and local educational agencies have legitimate and long-standing complaints with respect to the fairness and due process of the education auditing proceess." H.R. Rep. 98-1128, 98th Cong., 2d Sess, 53-54 (1984); 130 Cong. Rec. H.10756 (daily ed. Oct. 2, 1984). According to the Senate report, the provision was deleted in conference so that there would be an opportunity "to hold joint Senate and House hearings on the auditing process at an early date in the next Congress and to move an appropriate legislative remedy." *Id.*

ment for following *Bradley* and applying the intervening statute to the issue on appeal is even more compelling.

The Third Circuit, when considering whether to apply the 25% standard, also took into account its corrective nature as well as the fact that it enhanced the goals of the Title I program—socio-economic legislation with direct impact upon the future educational development of American youth. The Third Circuit found the legislative provision before it to be remedial because of its corrective nature as well as the social nature of the Title I program and concluded that such remedial legislation should be liberally construed to achieve its beneficial designs. *Tcherepnin* v. *Knight,* 389 U.S. 332 (1967). This was certainly an appropriate element in the court's overall consideration of whether to apply the 1978 eligibility standard to the Newark Title I program.

Finally, application of the 25% eligibility standard to the Newark Title I program visited no harm, much less "manifest justice," on the federal government. In *Bradley,* the Court identified three concerns pertinent to the "manifest injustice" exception to the general rule requiring application of the law in effect at the time of decision. These factors are "(a) the nature and identity of the parties, (b) the nature of their rights, and (c) the nature of the impact of the change in law upon those rights." *Bradley, supra,* 416 U.S. at 717.

With regard to the first factor, this Court distinguished suits involving "great national concerns," and parties who are public entities, from private suits involving individuals. *Bradley, supra,* 416 U.S. at 718-719, citing *United States* v. *Schooner Peggy,* 1 *Cranch* 103 (1801). Where private parties are concerned, the Court warned lower courts to "struggle hard against a construction which will, by a retroactive operation, affect the rights of parties. *Bradley supra,* 416 U.S. at 717, citing *Schooner Peggy, supra,* 1 *Cranch* at 110. The instant matter is a prime example of litigation which involves "great national concerns" namely

the largest federal program of assistance to education and not merely a private suit between individuals. Retroactive application of the corrective 25% eligibility standard is also encouraged by the fact that the parties to this suit are public entities. Indeed, courts have refused to find prejudice or manifest injustice in the application of new legislation to pending matters when the only interests affected by the congressional action are those of the government itself. *See, Hill* v. *United States,* 571 F.2d 1098, 1102 (9th Cir. 1978).

With regard to the "nature of the rights" of the parties and the "nature of the impact of the change in law upon those rights," there is certainly no vested right, in the matter *sub judice,* in the continued application of an administrative regulation which impedes the basic objectives of the Title I program. On the contrary, the only true right involved herein is the public "right" or expectation that Title I moneys will be expended to provide necessary compensatory education programs structured to meet the special needs of poor children living in areas with high concentrations of poverty. To the extent that the retroactive application of the 25% eligibility standard contained in the 1978 Amendments conforms implementation of the program to its original objective, it augments rather than impairs, that public right. The retroactive application of this eligibility standard to the Newark Title I program, therefore, presents no factors which would trigger the "manifest injustice" exception to retroactivity.[20]

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[20] The Secretary argues, for the first time before this Court, that the General Savings Statute, 1 U.S.C. §109, definitely establishes the prospectivity of the 25% eligibility standard. This argument is singularly unpersuasive. The General Saving Statute provides that "[t]he repeal of any *statute* shall not have the effect to release or extinguish any . . . liability *incurred under such statute* . . ." Since New Jersey's purported liability did not incur under any prior statute, but rather under deficient regulatory standards which were subsequently corrected by Congressional action, 1 U.S.C. §109 is inapplicable.

(Footnote continued on following page)

In measuring the eligibility of Newark's attendance areas by the corrective 25% standard, the Third Circuit faithfully adhered to this Court's ruling in *Bradley* v. *School Board of Richmond* since is applied the eligibility

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(Footnote continued from preceding page)

In this regard, it is well settled that "no statute is to be construed as altering the common law further than its words import." *Shaw* v. *Railroad Co.*, 101 U.S. 557 (1880). Courts have recognized this principle with specific reference to 1 U.S.C. §109. As a provision differing from the common law, 1 U.S.C. §109 "must be strictly construed and limited to repealed statutes" and not extended to the revocation of regulations promulgated by an administrator under legislative authority. *Rodgers* v. *United States,* 158 F.2d 835 (6th Cir. 1947), rev'd on other grounds, 332 U.S. 371 (1947); *United States* v. *Hark,* 49 F. Supp. 95 (D.C.D. Mass 1943), rev'd on other grounds, 320 U.S. 531 (1944), rehearing denied, 321 U.S. 802 (1944). The Secretary, nevertheless, contends that for the purpose of the General Savings Statute the term "regulation" may be substituted for "statute" and cites for that proposition *Batterton* v. *Francis,* 432 U.S. 416 (1977). In *Batterton,* however, this Court did not address the application of 1 U.S.C. §109 but simply considered whether regulations adopted by the Secretary of HEW were reasonable and within the statutory authority delegated to that official.

Although in the present case, unlike *Rodgers,* Congress did amend the ESEA to include a 25% eligibility standard, this particular amendatory provision did not represent a change in the direction of the Title I program as set forth in the prior statutory provision. Rather, the legislative objective was to correct regulations promulgated pursuant to the ESEA which actually thwarted the objectives of the Title I program. Thus, the ultimate effect of the subsequent Congressional action was not to repeal a statutory provision but to disapprove an administrative regulation. Indeed, the legislative history reveals continued support for the originally stated purpose of Title I to direct payments under the program to "educationally deprived children in school attendance areas having high concentrations of children from low-income families. . . ." 20 U.S.C. §241e(a)(1). Since the impact of the 25% eligibility standard enacted as part of the 1978 Amendments is on regulations, the General Savings Statute, codified in 1 U.S.C. §109, does not apply.

standard in effect at the time of its decision, since the statutory change concerned the precise issue pending before it on appeal, since there was no statutory direction or legislative history to indicate that the 25% eligibility provision could not be applied to pending audit claims and since the application of the standard to the Newark program resulted in no harm to the federal government but rather served to further the clearly articulated objectives of the Title I program. The Third Circuit thus fairly resolved the dispute before it. Given its imperative to justly resolve disputes presented to it, in equity, it could do no less, since the alternative solution sought by the Secretary—blind adherence to a long since discredited regulatory standard which operates to frustrate the goals of the Title I program—would work a grave injustice to the impoverished children of Newark.[21]

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[21] In his brief to the Court, the Secretary speaks in laudatory tones of the federal government's commitment to Newark, citing the fact that during the audit period (1970-73) Newark received over $28,000,000 in Title I funds—over 18% of the State's allocation (Pet. B 28, n. 17). In reality, sadly, the level of federal assistance, while appreciated, pales by comparison to that of the state and local taxpayes. While Title I moneys available to educationally disadvantaged children in Newark have remained fairly constant, *i.e.* $9,631,019 in 1970-71 $9,899,446 in 1971-72; $9,379,-648 in 1972-73 and $15,316,172 in 1983-84; State aid to Newark has increased dramatically, *i.e.* $21,566,996 in 1970-71; $29,069,240 in 1971-72; $38,517,410 in 1972-73 and $150,902,441 in 1983-84. Twentieth Annual Report of the Commissioner of Education, State of New Jersey; Twenty-First Annual Report of the Commissioner of Education, State of New Jersey; Twenty-Second Annual Report of the Commissioner of Education, State of New Jersey; Thirty-Third Annual Report of the Commissioner of Education, State of New Jersey.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

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